In today's environment, which is at a critical juncture in the development of broadband services, the FCC should not act to create regulatory uncertainty or embark upon changes that undermine legitimate regulatory expectations built over the course of many years. It is well-settled that in analyzing the public interest aspects of a proposed change in rules, the Commission must give weight to entities' reliance on the current regulatory framework.[60]

The importance of reasonable reliance is especially weighty where, as here, the FCC has not merely acquiesced in the activities, but rather has "invited and encouraged them."[61] Not only has the Commission endorsed an open framework for information services since at least the 1960s,[62] even just last year, the Commission reaffirmed that competitive information services are dependent upon the common carrier offering of basic services.[63] Noting that these basic services are the "building blocks" upon which enhanced services are offered, the FCC recognized that the BOCs' control of these bottleneck "building blocks" renders necessary the Commission's access

[60] *See e.g., Omnipoint Corp. v. FCC*, where the Court reiterated that "the Commission was required to take into account petitioners' justifiable reliance upon old rule when enacting new rule." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633 (D.C. Cir. 1996). *See also Sierra Club v. EPA*, 719 F.2d 436, 468 (D.C. Cir. 1983), *cert. denied sub nom. Alabama Power Co. v. Sierra Club*, 468 U.S. 1204 (1984). See also *DBS Report and Order*, In *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, IB Docket No. 95-168, PP Docket No. 93-253, Report and Order, 11 FCC Rcd 9712, 9740 at ¶ 74 (1995) ("*DBS Report and Order*"), *aff'd sub nom. DirecTV, Inc. v. FCC*, 110 F.3d 816 (1997) (the Commission declined to adopt restrictive cross-ownership rules because certain cable operators already had invested substantial resources in the creation of a DBS system, at least in part out of reliance on an earlier Commission decision not to prohibit cable/DBS cross ownership).

[61] *National Ass'n of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249, 255 (2d Cir. 1974) ("*NAITPD*").

[62] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Tentative Decision, 28 FCC 2d 291 (1970); Final Decision and Order, 28 FCC 2d 267 (1971) ("*Computer I*"), (subsequent history omitted); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) ("*Computer II*"), (subsequent history omitted); *Computer III*, 104 FCC 2d 958 (1986).

[63] *See CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd 7418 at ¶ 3.

requirements.[64] As such, the reliance by ISPs and other information service providers on the current regulatory framework has been reasonable and the sweeping detrimental changes proposed by the large ILECs should be rejected as contrary to the public interest.

The record also demonstrates that the proposed redefinition would have other adverse effects.[65] For example, many state commissions complain that the FCC's proposed definitional changes could eviscerate the 1996 Act implementation work done at the state level and conflict with state laws.[66] The Department of Justice and the FBI express concern that an FCC decision to eliminate the "common carrier" classification of DSL transmission services could render meaningless many provisions of CALEA.[67] And the Secretary of Defense describes concerns regarding national security and emergency preparedness communications should ILEC high-speed services be reclassified.[68]

To be sure, some carriers have attempted to downplay these effects through non-binding promises that they will continue to provide access to unaffiliated ISPs even in an environment devoid of regulation.[69] Yet, the latitude that would be allowed in the absence of legally binding

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[64] *Id.* at ¶ 3.

[65] *See e.g.,* Comments of Arizona Consumer Council et al at ii, 104. (chronicling the detrimental effect of removing regulatory obligations on vibrant civil discourse and preventing products from reaching the market). *See id.* at 30, 40, 43-47, 91-92, 106-08; Comments of California PUC at 40 (describing the ill effects of relying on the ILECs to permit smaller ISPs access on a private contract basis should FCC eliminate *Computer Inquiry* safeguards).

[66] *See e.g.,* Comments of Texas PUC at 2-4, 7 (noting that the FCC's proposed statutory classification could require the Texas Legislature to conduct a substantial re-write of the Texas Public Utility Regulatory Act and diminish the state's authority to implement its own laws). *See also* Comments of Florida PSC at 8-9 (noting that Florida is in the midst of several proceedings which will be affected by the FCC's proposed reclassification of services); Comments of Illinois Commerce Commission at 5, 18-19 (noting that the reclassification would undermine the states' work); Comments of Michigan PSC at 3; Comments of NARUC at 5-12.

[67] Comments of DOJ/FBI at 2.

[68] Comments of Secretary of Defense at 3-4.

[69] *See, e.g.*, Comments of SBC at 5, 28-29.

nondiscrimination requirements and just and reasonable price constraints,[70] leaves enormous room for discrimination, biased arrangements, and transport cost increases that are likely to impede unaffiliated ISPs and raise consumers' costs. In short, a vague promise to have some sort of openness is not a reasonable business substitute for a regulatory guarantee of access.

IV. THE FCC MAY NOT LAWFULLY DEFINE AWAY TODAY'S REGULATORY FRAMEWORK FOR WIRELINE CARRIERS

A. Elimination of the *Computer Inquiry* Framework for Broadband Telecommunications Services is Unsupported by the Record

The picture the ILECs paint as they push the FCC to eliminate common carriage for all of their "broadband" services ignores the unique history of ILEC regulation, the growth and development of wireline infrastructure and the implications for the public, including competing information service providers. Instead, the ILECs assume away the past, declaring unilaterally that there is today competition and that therefore, regulation is counter-productive and is inhibiting the risky new investments they must make.[71] This line of reasoning is contrary to the realities of the wireline carriers' broadband services.

In fact, while the large ILECs have failed to demonstrate in the record how Title II and the *Computer Inquiry* framework have actually impeded *their* innovation of new services,[72] they

[70] *See, e.g.*, Comments of Verizon at 31 (though *Computer Inquiries* obligations no longer should apply, Verizon does not want a closed network, and therefore is willing, on "commercially reasonable, market-based" terms, to offer its transmission services to unaffiliated ISPs); *See also,* Memorandum of Understanding, Letter from Donald E. Cain, SBC Communications, Inc. and David P. McClure, US Internet Industry Association, to Marlene H. Dortch, Secretary, FCC (May 3, 2002) ("*SBC MOU*").

[71] *See e.g.*, Comments of Lexecon, Inc. prepared at the request of Verizon; Comments of SBC at 13-14; Comments of BellSouth at 4-5; Comments of Verizon at 19.

[72] Instead, the BOCs offer speculative and general statements that they would innovate absent regulation, at the same time they fail to provide any examples of how such obligations have impeded progress on any specific innovation

have also completely avoided the public interest issue – whether *all participants* in the marketplace (including ISPs, other information service entities, content providers, etc.) have greater or lesser incentives to bring innovative services to the American public if these obligations are eliminated. The question has been answered by the Commission in the *Computer Inquiry*[73] and *Advanced Services*[74] orders: the enhanced services market, in which the large ILECs participate as unregulated providers, best delivers a range of diverse services when all have access to the incumbent LEC network functionalities. This conclusion is sound, as innovators would only invest in new service or content offerings if they hold a reasonable expectation that they have stable and definite access to the end-user customers. Without such an access expectation, independent innovators cannot be expected to innovate because their expected return on investment is severely hampered by the risky proposition that they would be able successfully to negotiate an access arrangement with the ILEC after their capital expenditure has been sunk. On the flip side, the large ILECs also urge, without any support, that the redefinition of common carrier services will better meet market demand.[75] These vague

or, if they did face such a circumstance, why the BOCs could not avail themselves of the FCC's rule waiver process. Indeed, the BOCs have sought and routinely obtained many waivers to Computer Inquiry obligations. *See e.g., Petition of Qwest Corporation To Provide Operator-Assisted Reverse Directory Assistance Service and for Waiver of any Comparably Efficient Interconnection Requirements That the Commission Might Deem Applicable,* Memorandum and Order, CC Docket No. 01-126 (Released Nov. 1, 2001); *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules,* Memorandum Opinion and Order, 10 FCC Rcd 1724 (adopted Jan. 11, 1995).

[73] *See e.g., Computer II,* 77 FCC 2d at 426, ¶109 (1980).

[74] *See e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Second Report and Order, 14 FCC Rcd 19237 at ¶ 3 (1999) ("*Advanced Services Second R & O*"); *CPE/Enhanced Services Unbundling Order,* 16 FCC Rcd at ¶ 46 (2001).

[75] *See e.g.,* Comments of BellSouth at 4-5; Comments of SBC at 5, 13-14, 24-25; Comments of Verizon at 1-5.

assurances to work out private contractual arrangements[76] are a poor substitute for the regulatory backstop that the Commission's existing safeguards provide.

Indeed, the FCC should recall that it was the BOCs themselves that urged the FCC to adopt the *Computer III* framework precisely because it would enable them to innovate, invest and compete in offering enhanced (information) services.[77] Thus, having successfully convinced the FCC that the *Computer III* framework would facilitate innovation, which it has done, these large ILECs now seek to argue that it is thwarting their ability to compete. Equity and common sense demand that the FCC reject these arguments. Given that these carriers have reaped the benefits of their regulated monopoly infrastructure, they should not now be insulated from competition on the grounds that it is somehow unfair.

Further, experience highlights that ILEC threats that they will no longer invest or innovate if they must allow access to competing ISPs or carriers are baseless.[78] These recycled arguments have been properly and soundly rejected each time on the basis of clear evidence to the contrary.[79] Certainly there has been no demonstration that there has been any decreased investment or suppressed innovation. Indeed, rather than consider the application of Title II common carrier requirements and unbundling obligations to be a burden, the FCC and Congress have indicated that the framework is pro-competitive and deregulatory.[80] Even when examining

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[76] *See e.g., SBC MOU* at 1-2.

[77] *Computer III,* 104 FCC 2d at 992. Ironically, these ILECs also urged at that time that "they no longer have the ability to engage in cross-subsidization," and that their facilities were no longer "economic bottlenecks." The FCC disagreed. *Id.* at 1011.

[78] *See e.g.,* Comments of SBC at 13-14; Comments of BellSouth at 4-5; Comments of Verizon at 18-21.

[79] The Supreme Court recently rejected these arguments, stating that the ILECs themselves have offered data that they have invested over $55 billion since the 1996 Act was passed. *Verizon* at 1675.

[80] *See e.g., Fifth Report and Order,* at ¶ 1; 47 U.S.C. § 160 (b).

the far more exacting obligations of TELRIC pricing, the Supreme Court similarly found the BOC arguments "contrary to fact" and an "unsupported theoretical attack" to allege that regulation provides any disincentive for competitive facilities-based competition.[81] In fact, common carriage has allowed wireline carriers to offer profitably competitive DSL services according to their business interests.[82] Significantly, while DSL technology has existed for quite some time, the ILECs did not deploy it generally as a data service until they faced a competitive threat from cable.[83] As such, sound public policy demands that the public switched telephone network – described by the FCC in the context of enhanced services competition as a "national resource"[84] should continue to be offered on just and reasonable rates, terms and conditions.

Finally, nothing in the record supports the proposed broad statutory reclassification of wireline carrier services. The record does not show that the proposed elimination of core Title II and *Computer Inquiry* rules would lead to any enumerated statutory goals, such as increased deployment of advanced services or even accelerated investment that would ultimately serve the public interest.[85] Instead, the record confirms that, in fact, there is reasonable and rapid

[81] *Verizon* at 1658-1659.

[82] *In the Matter of GTE Telephone Operating Cos.*, Memorandum Opinion and Order, CC Dkt. No. 98-79, FCC 98-292, 13 FCC Rcd. 22466 at ¶ 8 (rel. Oct. 30, 1998), *reconsideration denied*, Memorandum Opinion and Order, FCC 99-41 (rel. Feb. 26, 1999); *Advanced Services Second R & O* at ¶ 6.

[83] *See e.g.*, Comments of Covad at 21-22; *Bringing Home the Bits*, at Finding 5.2 (2002). Moreover, recent ILEC announcements indicate that the ILECs already intend to make significant DSL investments, including through an expansion of their services into voice services. *See e.g.*, <http://www.sbc.com/press_room/1,5932,31,00.html?query=20010131-1>.

[84] *Computer III*, 104 FCC 2d at 1036, ¶148.

[85] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans*, Third Report, CC Docket 98-146, 17 FCC Rcd 2844 at ¶ 2 (2002) (Congress instructed the States and the Commission to encourage the deployment of advanced services to all Americans. Accordingly, the Commission has made deployment of advanced services a central communications policy) (*"Third Report")*. *See also* Comments of Cbeyond et al at 7-9; Comments of Covad at 13, 32-36; Comments of DirecTV Broadband at 6; Comments of EarthLink at 20 ("The available evidence shows that incumbent LEC ADSL services under existing dominant carrier

investment in broadband access facilities.[86] In fact, the record shows that the consumer adoption rate of broadband access has exceeded that of many other recent technology deployments.[87] As such, there is no basis for the FCC to conclude that eradication of Title II and *Computer Inquiry* requirements will truly serve any of the FCC's articulated goals.

B. The Proposed Reclassification Is Unlawful Under Longstanding Legal Precedent

The *NPRM* appropriately frames the purpose of this proceeding "to classify the provision of wireline broadband Internet access, and to consider the regulatory implications of that classification."[88] As a majority of the Commissioners have already pointed out,[89] this review is not an inexorable drive to eliminate wireline carrier common carrier obligations no matter what the legal and public interest consequences. In fact, despite the assertions about the urgent need for "symmetry,"[90] the Communications Act and Commission precedent set forth the appropriate course to greater wireline deregulation, and following that course is not only mandated by law

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regulation have been a remarkable success for the incumbents"); Comments of Sprint at 5-10 ("There is no evidence to support the notion that the *Computer Inquiry* safeguards are hindering the deployment of broadband facilities"); Comments of Time Warner Telecom at 5-9 ("ILEC investment in broadband deployment is very substantial and deregulation of ILEC broadband service is unlikely to have a significant effect on ILEC investment decisions").

[86] *See Third Report*, 17 FCC Rcd at ¶ 2; U.S. Dept. of Commerce, Economics and Statistics Administration and National Telecommunications and Information Administration, *A Nation OnLine: How Americans Are Expanding Their Use of the Internet* at 37 (2002) ("*A Nation Online*") (As the Commission has stated and data supports, rollout of broadband access facilities has seen considerable growth in recent years.)

[87] *See e.g., Third Report* at ¶ 124; *See also A Nation Online* at 37.

[88] *NPRM* at ¶9.

[89] "While the call to 'level the playing field' has some appeal, we are limited by the Communications Act, which imposes different regulatory regimes on different types of providers." Separate Statement of Commissioner Kevin J. Martin, Approving in part and dissenting in part to *NPRM* (rel. Feb. 15, 2002); "Our responsibility is to implement the statute as Congress intended." Separate Statement of Commissioner Michael J. Copps, dissenting in part, concurring in part to *NPRM* (rel. Feb. 15, 2002); "I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice." Separate Statement of Commissioner Kathleen Q. Abernathy, *NPRM* (rel. Feb. 15, 2002).

[90] *See e.g.*, Comments of SBC at 34; SBC Exhibit Declaration of Alfred E. Kahn and Timothy J. Tardiff at 7-28.

but it will also best serve the engine of competition. Specifically, Section 10 of the Communications Act[91] provides the Commission and incumbent wireline carriers with the vehicle for deregulation, which is running its course now in the *Dominant/Non-Dominant NPRM*.[92] Yet, the large ILECs here urge the Commission to ignore the statutory framework and achieve what they could not otherwise attain within the four corners of the statute.[93]

Moreover, the application of Title II regulation to wireline carrier services is a matter of statutory interpretation informed by Commission and judicial precedent, not a matter of "deregulatory" results. Here, the fundamental statutory issue, as recognized by some BOCs, is whether the carrier is under a compulsion to serve as a Title II common carrier.[94] In fact, Commission and judicial precedent recognize several factors that, if present, would necessitate common carriage of ILEC broadband transport facilities, such as: (1) a carrier's market power;[95]

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[91] 47 U.S.C. § 160.

[92] Notably, the FCC previously refused to forbear from regulating ADSL service because SBC failed to demonstrate that forbearance would serve the public interest. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 at ¶ 79 (1998). Once again, in this proceeding the BOCs have failed to meet the specific criteria set forth in Section 10 necessary to justify forbearance.

[93] *See e.g.*, Comments of SBC at 8-16; Comments of BellSouth at 1-10; Comments of Verizon at 6-42; Comments of Qwest at 2-8.

[94] *See e.g.*, Comments of Verizon at 14-15; *NARUC v. FCC*, 525 F.2d 630, 642-644 (D.C. Cir. 1976) ("*NARUC I*"), *cert. denied*, 425 U.S. 992, 96 S. Ct. 2203, 48 L. Ed. 2d 816 (1976). The Commission has recognized that it has the authority to classify facilities as common carrier facilities subject to Title II of the Act "if the public interest requires that the facilities be offered to the public indifferently." *See e.g., AT&T Corp., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, File No. SCL-LIC-19981117-00025, Cable Landing License, 14 FCC Rcd 13066, 13080-81, ¶ 40 (1999).

[95] *Competitive Carrier FNPRM* at 448 ¶ 8 ("at least one basis for the imposition of common carrier obligations is the possession of market power so clearly addressed by the 1934 enactment."); *Atlantica USA LLC*, File No. SCL-LIC-19990602-00010, Cable Landing License, 14 FCC Rcd 20787, 20793 ¶ 13 (Telecomm. Div. 1999) (a compulsion to operate as a common carrier would not serve the public interest where carrier's affiliate was not dominant in international *or the local access market*) (emphasis added).

(2) the lack of sufficient alternative common carrier facilities to address user needs;[96] (3) a carrier's control of potential bottleneck facilities;[97] (4) the need for nondiscriminatory access to a carrier's facilities;[98] (5) the need to deter anticompetitive conduct by a carrier and/or to stimulate competition generally;[99] (6) the need to safeguard reasonable rates;[100] and (7) the general need to impose Title II obligations on ILECs in light of market circumstances.[101]

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[96] *Cable & Wireless, PLC*, File No. SCL-96-005, Cable Landing License, 12 FCC Rcd 8516, 8522 ¶ 15 (1997) ("*Cable & Wireless*") (Under *NARUC I*, the Commission "generally [has] focused on the availability of *alternative common carrier facilities* in assessing whether to require that a proposed cable be offered on a common carrier basis.") (emphasis added); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474 (D.C. Cir. 1984) (a "key concern" in the Commission's public interest evaluation was "the adequacy of the remaining common carrier capacity to serve users' needs.").

[97] *AT&T Corp., Joint Application for a License to Land and Operate in the United States a Digital Submarine Cable System Extending Between the United States, China, Taiwan, Japan, South Korea, and Guam*, File No. SCL-98-002, Cable Landing License, 13 FCC Rcd 16232, 16237 ¶ 15 (Telecomm. Div. 1998) ("we might find common carrier regulation appropriate if the [system] becomes a potential bottleneck facility."); *See also, GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000) (after reviewing the proceedings before the Commission, the court finds the Commission reasonably concluded that it could not rely exclusively on non-structural safeguards given the monopoly power of the LECs that stems from their bottleneck control over local landline infrastructure); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9629 (2001) (seeking comment on whether, because the terminating local carrier still possessed bottleneck control over the trunk port at the central office, it could still exercise monopoly power).

[98] *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd at ¶¶3-4 (2001) (an "essential thrust" of *Computer II* was to provide non-discriminatory access to basic transmission services by all enhanced service providers; "[t]he Commission implemented enhanced services unbundling requirements to ensure such nondiscriminatory access to basic services.").

[99] *See Cable & Wireless*, 12 FCC Rcd at 8530 ¶ 39 ("Our ability to change the regulatory status of a non-common carrier cable also remains available for redressing anticompetitive discrimination"); *China-US Cable Landing License*, 13 FCC Rcd at 16237 ¶ 15 ("We might also find [Title II] regulation necessary to address anticompetitive conduct"). Similarly, the Commission has noted that it is unnecessary to impose common carriage regulation where "competition will achieve the same result for purchasers of space segment capacity as regulation, that is, efficient service at low prices." *Cable Landing License NPRM*, 15 FCC Rcd at 20817, ¶ 65 n.130 (citing *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238, 1254-55 (1982), *aff'd, Wold Communications, supra, modified, Martin Marietta Communications System*, Memorandum Opinion and Order, 60 Rad. Reg. (P&F) 2d 779 (1986)).

[100] *Atlantica*, 14 FCC Rcd at 20790 ¶ 8 (where there are sufficient alternative facilities, the regulatee would lack market power, and therefore would be unable to charge monopoly rates for submarine cable capacity).

[101] *Competitive Carrier FNPRM*, 84 FCC 2d at 464 ¶ 54c (Commission notes that "we can and should examine in light of current conditions whether particular Title II obligations . . . are appropriately imposed on specific entities in particular market circumstances.").

An examination of ILEC market power in the provision of wholesale broadband transport, the lack of sufficient *common carrier* alternatives to these offerings in the market, and the ILEC control over the "last mile" bottleneck facilities all dictate that the ILECs be treated as Title II common carriers. These three factors are, of course, amply addressed in the *Dominant/Non-Dominant NPRM* proceeding. Moreover, it is important to reiterate that incumbent wireline carriers surely control the "bottleneck" facilities – local loops, central offices, interoffice transmission facilities – that are necessary for any other common carrier to compete. Further, the ILECs can cite to no other alternative common carrier facilities available to ISPs that replicate or compete with their wholesale DSL services. Rather, the FCC's data demonstrate that terrestrial wireless, satellite, and competitive LEC services offer no match to the incumbent LEC DSL services, either in terms of market penetration or coverage.[102]

Moreover, the evidence of the ILECs' discriminatory conduct and anticompetitive actions toward ISPs literally fills the Commission and state proceedings, making common carrier regulation a necessity to avoid unreasonable conduct and further discrimination. Specifically, the record shows that incumbent LECs have engaged in a number of discriminatory tactics against competing ISPs and competitive LECs.[103] This conduct against competitors would undoubtedly rise were this proceeding to result in an elimination of the very nondiscrimination obligations designed to prevent such conduct.

Another relevant factor weighing in favor of common carriage and *Computer II/III* type obligations is the BOCs' unique market advantages even among incumbent LECs. As discussed

[102] *Id.* at 245-250. Further, as the FCC has noted, cable does not offer wholesale transmission services on a common carrier basis. *See Cable Broadband Ruling and NPRM* GN Docket 00-185 at ¶ 60.

above, the BOCs' long-standing monopoly advantages have provided them with decades of accruing monopoly rents and benefits.[104] The FCC's *Computer III* precedent also recognizes that the BOCs in particular hold advantages not enjoyed even by other ILECs. More recently, Courts have also noted that the heightened statutory safeguards, such as Section 271, are reasonable in light of the BOCs' unique market power.[105] Thus, while the BOCs appear to be the only parties genuinely favoring the proposed "Title I deregulation," they are also the entities most able to engage in anticompetitive behavior at odds with the public interest in competitive telecommunications and information service markets.

It is a well-settled tenet of administrative law that the FCC cannot irrationally shift course without examining the issues presented and providing a sound and legitimate basis for its regulatory changes.[106] Yet, no evidence has been presented in the record that the proposed reclassification would be consistent with Commission, statutory and *NARUC I* precedent. The reason that the *NARUC I* test demands common carriage in this case is that, as a matter of policy and practice, the BOCs possess the ability to engage in unreasonable and discriminatory actions against competing ISPs and, ultimately, harm consumer welfare. Nothing that the BOCs have proposed would suggest that they do not intend to obtain for themselves the regulatory blessing to do so.

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[103] *See e.g.*, Comments of DirecTV Broadband at 2-6; Comments of WorldCom at 26-27.

[104] *See* Section I. *supra*.

[105] *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 243 (5th Cir. 1998) (citing *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998)).

[106] *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57, 103 S. Ct. 2856, 2874 (1983); *Greater Boston Television Corp*. v. *FCC*, 143 U. S. App. D. C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971).

Lastly, sound administrative decision making mandates that the Commission practice what it preaches to the international community on how to open markets for competitive services. Indeed, many countries have followed the example of the FCC's *Computer Inquiry* precedent, and consumers in those countries enjoy the benefits of those policies with more vigorous enhanced services competition.[107] For the Commission to reverse course on the predicates of *ComputerII/III* and engage in a statutory reclassification of incumbent LEC broadband transport would send a deeply confusing and troubling message to the international community. Having been soundly advocating for increased competition for years at all levels of foreign communications markets,[108] such a significant reversal by the FCC would also strike a serious set back for American firms seeking access to yet-developing non-domestic incumbent LEC local access networks. Thus, the Commission must weigh the national as well as international consequences that could follow from a reversal of decades-old Commission policy promoting intra-modal competition.

[107] *Enhanced Services*, Canadian Telecom Decision, CRTC 84-18, (Ottawa, July 12, 1984) (citing definitions of basic and enhanced services as adopted by the FCC in *ComputerII*).

[108] Donald Abelson, Address at the Pacific Telecommunications Commission Mid-Year Seminar (as prepared for delivery 25 Jun, 2002) (transcript available at http://www.fcc.gov/ib/).

CONCLUSION

For the foregoing reasons, AOL Time Warner urges the FCC to continue to require wireline carriers to offer their broadband transmission services on existing and future infrastructure to unaffiliated information service providers on nondiscriminatory rates, terms and conditions to promote competition and consumer choice.

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Certificate of Service

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